Supreme Court, U.S.
FILED
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No. 08-

IN THE

Supreme Court of the United States

MARLON OLIVAS,

Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA

Respondent

On Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does California's unconditional and forced application of its statute "allowing" absence from misdemeanor sentencing proceedings violate due process, where the defendant's absence is involuntary?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case was October 31, 2007. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

> of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Pen. Code § 1193(b):

> If the conviction be of a misdemeanor, judgment may be pronounced against the defendant in his absence.

STATEMENT OF THE CASE

The prosecution filed a complaint on August 3, 2001, which charged Mr. Olivas as follows:

Count 1 – concealed firearm in a vehicle, a felony (Cal. Pen. Code § 12025(a)(1)); further alleged to have been stolen (Cal. Pen. Code § 12025(b)(2));

Count 2 – carrying a loaded firearm in a vehicle, a felony (Cal. Pen. Code § 12031(a)(1)(B)); further alleged to have been stolen;

Count 3 – receiving or concealing stolen property, a felony (Cal. Pen. Code § 496 (a)); and

Count 4 – resisting arrest, a misdemeanor (Cal. Pen. Code § 148(a)(1)).

On August 15, 2001, Mr. Olivas entered a plea of no contest to Counts 3 and 4, on condition that the case would be reduced to a misdemeanor at the time of sentencing upon compliance with probation, and entering and staying in a residential drug ad. iction treatment program pending sentencing date, with a maximum sentence of 1 year in county jail. Dismissal of Counts 1 and 2 was continued to the time of sentencing.

Mr. Olivas had been released on his own recognizance, but failed to appear at sentencing on November 14, 2001 due to his arrest in Las Vegas, Nevada.

Mr. Olivas prepared a pro per petition for writ of habeas corpus. On February 1, 2006, Mr. Olivas' trial counsel submitted a memorandum to the clerk of the Superior Court requesting a hearing date for a motion to withdraw plea. An unfiled copy of Mr. Olivas' pro per habeas corpus petition was attached

to the memorandum. In that draft petition for writ of habeas corpus, Mr. Olivas wrote:

> Petitioner wants to withdraw plea and proceed to trial; the want, warrant, hold, or otherwise detainer is *keeping him confined* at a medium-maximum security prison thereby creating a liberty interest.
>
> Petitioner plead guilty to 496 of the California Penal Code, receiving stolen property as a felony and violation of Penal Code section 12020, possession of a dangerous weapon as a felony was to be dismissed. On November 14, 2001, Petitioner did not appear in court on either of these matters, and warrants were issued thereafter. Mr. Clark [trial counsel], according to the court record, informed the judge that Petitioner had been arrested in Las Vegas, Nevada. Petitioner has contacted the Monterey County Public Defender's Office, as well as the court, requesting that his guilty plea be withdrawn so that he may proceed to trial as of right; Petitioner has not heard from his attorney since that request.

On March 23, 2006, the case came on for sentencing. Mr. Olivas was not present because he was confined in prison in Nevada. Defense counsel stated that he was waiving Mr. Olivas's presence and requested that sentencing be imposed that day. This "waiver" was offered and accepted without any evidence or query as to whether Mr. Olivas had been

advised of his right to presence. Nor was there any comment or follow-up concerning Mr. Olivas's pro per draft petition for writ of habeas corpus or of trial counsel's memorandum regarding the need to set the case for a motion to withdraw plea.

On its own motion and without objection by the district attorney, the trial court ordered Count 3 reduced to a misdemeanor, and sentenced Mr. Olivas to serve "one year" in the county jail, concurrent with the sentence he was then serving in Nevada.

Count 3, receipt of stolen property, is an aggravated felony under federal immigration laws if a sentence of at least one year is imposed, even when the crime is entered as a misdemeanor under state law. Under those circumstances, a convicted misdemeanant is not eligible for cancellation of removal.[1]

On May 15, 2006, defense counsel filed a motion to reconsider sentence, in which a one-day reduction of sentence was requested to avoid triggering devastating immigration consequences. On May 26, 2006, that motion was denied and an appeal was taken.

The California Court of Appeal affirmed in an opinion filed July 17, 2007.[2] The Court of Appeal acknowledged the constitutional right to presence at sentencing, but found waiver sufficiently established

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[1] 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(G); *Ramirez-Pina v. I.N.S.*, 32 Fed. Appx. 839 (9th Cir. 2002) (365-day sentence rendered alien ineligible for cancellation of removal upon conviction for California theft offense, since 365 days is at least one year).

[2] The Court of Appeal's opinion (hereinafter Opn.) is Appendix A to this petition.

by trial counsel's oral representation that Mr. Olivas was waiving that right. Opn. A-2, A-3, A-5. The Court of Appeal reasoned that, because California Penal Code section 1193(b) authorizes judgment to be pronounced in the defendant's absence in the case of misdemeanors, there was no error:

> [O]nce the trial court had reduced defendant's felony conviction to a misdemeanor, defendant had a right to be absent as in any misdemeanor case. It follow that defendant's attorney could appear at sentencing, as he did, and waive defendant's presence.

Opn. A-6. The Court of Appeal found Mr. Olivas's pro per draft petition for writ of habeas corpus to be insufficient to cast doubt on trial counsel's authority to waive defendant's presence at sentencing. Opn. A-7.

In a petition for rehearing Mr. Olivas further emphasized the federal constitutional due process violation of his right to presence, and that it was not validly waived by constitutional standards. That petition was summarily denied on August 10, 2007. Mr. Olivas sought discretionary review from the California Supreme Court, asserting the invalidity of the waiver stated by trial counsel on the record and the constitutional deprivation of Mr. Olivas's right to presence. The California Supreme Court denied review on October 31, 2007.[3]

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[3] The order denying review is Appendix B to this petition

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question of Due Process Law as to Whether the Right to Presence at Sentencing Applies to Misdemeanants, Which the California Courts are Treating as Statutorily Immune From the Constitution.

The source of the right to presence is the Due Process Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment. *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The courts' obligation to enforce the right to presence is more lax in misdemeanor cases, yet that duty does not *evaporate* in misdemeanor cases. *United States v. Christopher*, 700 F.2d 1253, 1262 (9th Cir.), *cert. den.*, 461 U.S. 960 (1983) (applying Fed. R. Crim. P. 43).

Obviously the basis for relaxing the rule in misdemeanor cases is because the sentences are minor compared to felony terms. However, collateral consequences can still render a misdemeanor conviction far from benign. 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(G); *Ramirez-Pina v. I.N.S.*, *supra*, 32 Fed. Appx. 839 (365-day sentence rendered alien ineligible for cancellation of removal upon conviction for California theft offense, since 365 days is at least one year). Thus, even misdemeanors are criminal convictions that trigger the fundamental rights of the accused. *United States v. Christopher*, *supra*.

If a defendant's absence is voluntary, then due process is not offended. *United States v. Gagnon*, *supra*, 470 U.S. at 529. But when the defendant is

in custody, the validity of a waiver of presence must be treated with particularly careful scrutiny. *Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990). In a felony case, the waiver of right to presence must be made personally by the defendant on the record. *United States v. Gordon*, 829 F.2d 119, 125-26 (D.C. Cir. 1987). Among other things, the court is obliged to ensure that any waiver is knowing and intelligent, based on the defendant's actual awareness of the right that is the subject of the waiver at issue. *Johnson v. Zerbst,* 304 U.S. 458, 464-65 (1938); *United States v. Nichols*, 56 F.3d 403, 416-17 (2d Cir. 1995); *Cross v. United States*, 325 F.2d 629, 633 (App. D.C. 1963).

The convicted defendant's interests at stake are well recognized in the law on the right to allocation. The deprivation of that right is reversible per se where the defendant indicated a desire to address the court, but was not given the opportunity to personally speak. *Boardman v. Estelle*, 957 F.2d 1523, 1527-1529 (9th Cir.), *cert. den.*, 506 U.S. 904 (1992); *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. N.C. 1978), *cert. den.*, 441 U.S. 966 (1979). "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961) (Frankfurter, J., writing for the plurality), as quoted in *Boardman v. Estelle, supra,* 957 F.2d at 1524. However it remains unsettled whether a trial court is *obliged* to provide a convicted defendant the opportunity to speak at sentencing, and if so under what conditions, or whether the right to allocution merely *allows* the court to provide that opportunity. See *McGautha v. California*, 402 U.S. 183, 218 n.22,

28 (1971) (citing *Hill v. United States*, 368 U.S. 424, 429, (1961)) (noting that the Court has not addressed the issue of whether a court's refusal to allow a defendant to allocute is a Constitutional violation), *vacated sub nom. Crampton v. Ohio* , 408 U.S. 941, (1972).

The instant case is well-suited to serve as a vehicle for this Court to address the parameters of the right to presence at sentencing and the trial court's duty to enforce the constitutional guarantee of due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
MEREDITH FAHN
(Counsel of Record)
Attorney for Petitioner
MARLON OLIVAS

Date: January 29, 2008

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

H030224

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent,
v.

MARLON OLIVAS, Defendant and Appellant

Court of Appeal – Sixth App. Dist.
FILED
JUL 17 2007
MICHAEL J. YERLY, Clerk
By_____
Deputy

Defendant Marlon Olivas entered a negotiated plea of no contest to felony receiving stolen property and misdemeanor resisting a public officer. He failed to appear at sentencing because he had been arrested in Nevada. At a sentencing hearing over four years later held in the presence of defendant's counsel while defendant was in Nevada's custody, the trial court, consistent with a plea-bargained condition, reduced the receiving

conviction to a misdemeanor and imposed one-year sentences. It ran the sentences concurrently with a Nevada sentence of nine to 24 years. On appeal, defendant contends that the trial court transgressed his constitutional right to be present at sentencing. We disagree and affirm the judgment.

BACKGROUND

Defendant entered his plea in August 2001 but failed to appear for sentencing in November. The Nevada court sentenced defendant in April 2002.

In October 2005, defendant wrote to his attorney (the Monterey County Public Defender) about this case. His attorney replied that sentencing in the case was pending and that he could place the matter on calendar. He asked defendant for certain information and an authorization to appear. He appeared at a sentencing hearing in March 2006, waived defendant's presence, and agreed to the negotiated sentence.

DISCUSSION

A criminal defendant has a constitutional and statutory right to be present at all critical stages of the proceedings, including sentencing hearings. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 15.) Although the right to be present for the commencement of trial arguably cannot be waived (see *Crosby v. United States* (1993) 506 U.S. 255, 258-262), the right to be present thereafter is waived if (1) the defendant is disruptive (*Illinois*

v. Allen (1970) 397 U.S. 337, 343) or (2) the defendant is voluntarily absent (*Taylor v. United States* (1973) 414 U.S. 17, 18-20).

In California, Penal Code sections 977 and 1043 implement the right to be present.[1]

Section 977, subdivision (b)(1) provides that "[i]n all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present."

Section 1043 states, in pertinent part: "(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial. [¶] (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] (1) [disruptive behavior] [¶] (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. [¶] . . . [¶] (d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with Section 977."

When sections 977, subdivision (b)(1), and 1043 are read together, a felony defendant may be

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[1] Further unspecified statutory references are to the Penal Code.

absent from trial (1) under the waiver provisions in section 977, subdivision (b)(1) regarding "all other proceedings," (2) when the trial court removes him or her for disruptive behavior, or (3) when he or she is voluntarily absent after a trial has begun for an offense not punishable by death. (See also § 1193, subd. (a), fn. 4, *post.*)

A defendant in a misdemeanor proceeding also has a statutory right to be absent and appear through counsel. (§ 977, subd. (a) ["In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only . . . ."].) This section, together with section 1043, subdivision (e), require the trial court to proceed with the trial of a misdemeanor defendant if there is a waiver of appearance pursuant to section 977, subdivision (a).[2]

"In construing the statutory right of an accused to be absent from misdemeanor proceedings, case law has recognized that the right is conditional: a

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[2] Section 1043, subdivision (3), pertains specifically to "the defendant in a misdemeanor case" and provides that the trial court shall proceed with the trial in the defendant's absence (unless good cause for a continuance exists) if the defendant has authorized his counsel to so proceed pursuant to section 977, subdivision (a). However, if the defendant has not authorized his counsel to proceed in his absence and fails to personally appear at trial, the trial court, in its discretion, may do one or more of the following: (1) continue the matter; (2) order bail forfeited or revoke release on the defendant's own recognizance; (3) issue a bench warrant; (4) proceed with the trial if it finds the defendant has absented himself voluntarily with full knowledge that the trial is to be held or is being held. Further, the trial court has the right to order the defendant to be personally present at trial for purposes of identification unless counsel stipulate to the issue of identity.

defendant who absents himself must do so with full knowledge of the pendency of the criminal proceedings, as the waiver of the right to be present must be a knowing and intelligent one. [Citation.] Further, the court must be certain that the acts of counsel are authorized by the defendant. [Citation.] However, the court can rely upon the representation of counsel that the accused is knowingly absent from the proceedings. [Citation.] In the absence of a statutory requirement that the attorney's authority be evidenced by a writing, it is always presumed that an attorney appearing and acting for a party has authority to do so. [Citation.] This confidence rests not only upon a belief in the honor and integrity of the attorney, but upon the fact that the attorney is a sworn officer of the court. [Citation.] [¶] Neither section 977, subdivision (a) nor section 1043, subdivision (e) requires the attorney's authorization to be in writing. Thus, without a strong factual showing to the contrary [citation], the attorney's representation that he or she is authorized to proceed in the defendant's absence is sufficient." (*People v. American Bankers Ins. Co.* (1987) 191 Cal. App. 3d 742, 746-747, fn. and italics omitted.)

Defendant contends that his right to be present at sentencing was not waivable because he was "charged" with a felony (§ 977, subd. (b)) in a "felony case" (§ 1043, subd. (a)). He points out that he was charged with a felony in a felony case because a felony case "means a criminal action in which a felony is charged and includes a criminal action in which a misdemeanor or infraction is charged in conjunction with a felony." (§ 691,

subd. (f).) He reasons that the plea-bargained reduction of the felony conviction to a misdemeanor conviction does not affect this analysis. We disagree.

Defendant overlooks that section 1193, subdivision (b), provides that "If the conviction be of a misdemeanor, judgment may be pronounced against the defendant in his [or her] absence."[3] This provision speaks of a misdemeanor conviction not a misdemeanor charge or case.[4] Thus, once the trial court had reduced defendant's felony conviction to a misdemeanor, defendant had a right to be absent as in any misdemeanor case. It follows that defendant's attorney could appear at sentencing, as he did, and waive defendant's presence.

Defendant argues that he presented a strong factual showing to counter the presumption that his attorney had authority to proceed in his absence. He relies on a petition for writ of habeas corpus that he prepared and filed before the sentencing hearing in which he sought to withdraw his plea. In the petition, he claimed that he had received ineffective assistance of counsel because counsel had coerced him into pleading guilty rather than pursuing a defense

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[3] The People also overlook this pivotal statute.

[4] The felony companion subdivision, section 1193, subdivision (a), similarly speaks of a conviction. It states that "If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless [the defendant is represented by an attorney, the defendant signs a written waiver, and the trial court approves the absence] . . . ."

and proceeding to trial.[5]

But the trial court was not required to accept that defendant's petition allegations cast doubt on counsel's authority to waive defendant's presence at sentencing. Defendant's petition sought alternative relief. It asked "to proceed to trial, or in the alternative, seek plea negotiations that are not felonies." Thus, the trial court could have inferred that defendant objected to a felony conviction and sought to erase the conviction via habeas corpus or sentencing. In this setting, counsel's authority to negotiate a misdemeanor conviction in place of the felony conviction and waive defendant's presence at sentencing could be considered manifest rather than questionable.

DISPOSITION

The judgment is affirmed.

_____s/_____
Premo, J.

WE CONCUR:

_____s/_____
Rushing, P.J.

_____s/_____
Elia, J.

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[5] The record does not reflect any disposition of defendant's petition. It does indicate that defendant's counsel asked the trial court to treat the petition as a motion to withdraw the plea. But it does not show any response to the request.

S155821

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,
v.

MARLON OLIVAS, Defendant and Appellant

The petition for review is denied.

SUPREME COURT
FILED
OCT 31 2007
Frederick K. Ohlrich Clerk

Deputy

GEORGE [stamp]
Chief Justice